



IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

~~ELOUISE PERION COBELL~~, et al., )

Plaintiffs-Appellees, )

v. )

GALE A. NORTON,  
Secretary of the Interior, et al., )

Defendants-Appellants. )

Nos. 03-5262, 04-5084

[Civil Action No. 96-1285 (D.D.C.)]

### EMERGENCY MOTION TO CONSOLIDATE APPEALS

Appellants, the Secretary of the Interior, et al., have appealed from the district court's preliminary injunction of March 15, 2004 requiring agency-wide disconnection from the internet. The government is seeking an emergency stay of that order. In this motion, we ask that our appeal from the March 15 order be consolidated with our pending appeal from the July 28, 2003 preliminary injunction that also requires internet disconnection.

That appeal, docketed as No. 03-5262, is proceeding on an expedited schedule, under which the government's brief is due on April 6, 2004. The March 15 order purports to supersede and replace the previous preliminary injunction. Because the March 15 order addressed precisely the same subject matter as the July 28 order, and because the new order will pose significant and ongoing harm to the government and the public absent a stay, it is appropriate that the two appeals be consolidated and resolved at the earliest possible time.<sup>1</sup>

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<sup>1</sup>Plaintiffs' counsel has been given advance notice, by telephone, of the filing of this motion.

1. The pertinent background of the case is set forth in detail in our emergency stay motion filed in this Court together with the present consolidation motion. The underlying litigation involves a claim for an accounting of funds held in trust for the benefit of individual Indians. The case has previously been before this Court in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003), and Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). The government's appeal from a September 25, 2003, "Structural Injunction" is pending in No. 03-5314. See also No. 03-5047 (mandamus petitions argued March 15, 2004); No. 03-5288 (mandamus petition to be argued April 8, 2004).

2. At issue in No. 03-5262 is a preliminary injunction issued on July 28, 2003, that requires the Department of Interior to disconnect from the Internet all computer systems housing or providing access to individual Indian trust data (IITD). Although the injunction purported to require immediate disconnection, it did not in fact do so. The injunction included a procedure that delayed its full impact. Interior was allowed to submit certifications showing that the systems still connected to the internet were either "essential for protection against fires or other threats to life or property" or that these systems either did not house or access IITD or were secure from Internet access by unauthorized users. With regard to the systems that were already disconnected, Interior was required to file proposals "setting forth a method of approving individual reconnections of disconnected Interior computer systems, and of determining whether the Reconnected Systems should stay reconnected."

On August 11, 2003, the Department of the Interior submitted certifications as required by this injunction, and later submitted a proposal for reconnecting systems that had previously been disconnected.

This Court has established an expedited briefing schedule in the government's appeal from the initial preliminary injunction, pursuant to which the government's opening brief is due on April 6, 2004. That appeal is proceeding on the same briefing schedule as the government's appeal, in No. 03-5314, from the "structural injunction" issued by the district court in September 2003.

3. At issue in No. 04-5084 is a new preliminary injunction issued by the district court on March 15, 2004. In issuing that injunction, the court rejected the certifications filed by the Department pursuant to the terms of the July 2003 order. On that basis, and despite the pendency of the government's appeal of the July 2003 preliminary injunction, the court radically modified its earlier order, requiring the Department immediately to disconnect the vast majority of its computers from the internet.<sup>2</sup> Because the March 15, 2004 injunction requires immediate and across-the-board disconnection of thousands of Interior computers, the government has sought an emergency stay pending appeal.

4. The two appeals involve identical subject matter. Indeed, the March 15, 2004 order purports to "supersede" and "replace" the July 2003 order. The government's appeal from the July 28, 2003 order cannot sensibly proceed without reference to the order that "supersedes" it. Equally clearly, the March 15 ruling warrants expedited review. Accordingly, the two appeals should be consolidated and briefing should proceed on the schedule already established in No. 03-5262.

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<sup>2</sup>The order allows the systems of the National Park Service, U.S. Geological Survey, and Office of Policy Management and Budget, to remain on-line.

## CONCLUSION

For the foregoing reasons, the appeals in Nos. 03-5262 and 04-5084 should be consolidated, and the two appeals should proceed on the briefing schedule already in existence for No. 03-5262.

Respectfully submitted,

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MARCH 2004

## CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2004, I caused copies of the foregoing motion to be sent to the Court and to the following by hand delivery:

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